

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LACEDRIC W. JOHNSON,
Plaintiff,

v.

RON BROOMFIELD, et al.,
Defendants.

Case No. 21-07158 EJD (PR)

**ORDER OF SERVICE; OF
DISMISSAL WITH LEAVE TO
AMEND; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

Plaintiff, a state prisoner at San Quentin State Prison (“SQSP”), filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983. Dkt. No. 1. The action was reassigned from Magistrate Judge Thomas S. Hixson to the Undersigned because Plaintiff did not file consent to the jurisdiction of a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). Dkt. Nos. 4, 5. Plaintiff has filed a motion for leave to proceed *in forma pauperis* which will be addressed in a separate order. Dkt. No. 2.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a

prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

B. Plaintiff's Claims

Plaintiff alleges that shortly after Governor Gavin Newsom declared a state of emergency on March 19, 2020, regarding the Covid-19 pandemic, the Secretary of the CDCR, Ralph Diaz, announced on April 1, 2020, the decision to accelerate the release of certain nonviolent inmates who were within 60 days of release in order to reduce the spread of the virus. Dkt. No. 1 at 4. Plaintiff alleges that the determination was made jointly by the CDCR and the Governor, and that J. Clark Kelso, the Federal Receiver, was also signatory to the Memorandum. Id.

Plaintiff alleges that on April 9, 2020, he filed a health care grievance, No. SQ-HC-20000274, claiming that he had a pre-existing condition that compromised his immune system due to contracting Valley Fever in 2011, a fungus that attacks the lungs, and a recent battle with leukopenia (low white blood cells). Id. at 5. He requested “emergency release.” Id. He was interviewed by Defendant Nurse Podolsky by telephone on April 21, 2020, who informed him that “there is nothing we can do for you, it’s a custody issue.” Id. Plaintiff pursued an inmate grievance (Log No. SQ-A-20-01468) on the matter, which was rejected; when he resubmitted the appeal to the Acting Warden Ron Broomfield, it was not returned. Id. On April 30, 2020, Plaintiff filed for an “Early Release/Commutation” to the

1 Governor's Office but never received a response. Id.

2 Plaintiff claims that after the California Institute for Men ("CIM") experienced a
3 Covid-19 outbreak in May 2020, the CDCR transferred 121 inmates from CIM to SQSP on
4 May 30, 2020, "in an effort to protect those individuals from the virus." Id. at 7. Plaintiff
5 claims that by the time several of these transferees had tested positive for Covid-19, they
6 had been in open housing units for six days. Id. at 8. Plaintiff claims that on June 11,
7 2020, he began to experience various symptoms: hacking cough that left a peculiar taste on
8 his tongue, labored breathing, wheezing in the lungs and chest cavity, and coughing up
9 blood. Id. He was transferred to the hospital where he remained until June 13, 2020; there
10 he was diagnosed with heart failure and "other Covid-19 related injuries." Id. at 9. Upon
11 his return to SQSP, he was placed in administrative segregation, "the hole," for a 14-day
12 quarantine. Id. On June 17, 2020, Dr. Smith told Plaintiff that he had Covid. Id.

13 Plaintiff claims that on June 15, 2020, an "Urgent Memo" was released, which
14 indicated that Acting Warden Ron Broomfield, Clarence Cryer, Alison Pachynski, and Dr.
15 Shanon Garrigan knew of various deficiencies at SQSP which required immediate action
16 but that they failed to act, well in advance of Plaintiff contracting Covid-19 and suffering
17 heart failure and other injuries from infection. Id. at 9-10. Plaintiff filed another health
18 care grievance, again requesting expedited release; it was denied at the "Headquarters'
19 level response" on December 7, 2020. Id. at 10. Plaintiff filed an inmate grievance on
20 September 15, 2020, alleging deliberate indifference to pre-existing medical conditions
21 and seeking early release and compensation; Plaintiff also referred to his previous inmate
22 appeal, Log No. SQ-A-20-01468, which had gone unanswered by the Acting Warden. Id.
23 at 11.

24 Plaintiff also refers to an inspection report covering the period of June 24, 2020 to
25 January 29, 2021, conducted by the State of California's Department of Industrial
26 Relations Division of Occupational Safety and Health ("OSHA") which found numerous
27 violations at SQSP. Id. at 11-12. Plaintiff claims that all these violations had a severe
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1 impact on him contracting Covid-19 and suffering heart failure, and that Acting Warden
2 Broomfield is responsible for keeping the prison in compliance with OSHA standards,
3 along with Ralph Diaz and Kathleen Allison. Id. at 12. Plaintiff also refers to a report
4 issued by the Officer of the Inspector General dated February 1, 2021, which included a
5 discussion on the CDCR's decision to transfer inmates from CIM to SQSP. Id. at 12.
6 Plaintiff alleges that the report found that efforts by J. Bick, R. Tharrat, R. Diaz, and K.
7 Allison to prepare for an execute the transfers were "deeply flawed and risked the health
8 and lives of thousands of incarcerated persons and staff." Id. at 13. Plaintiff claims that
9 within two weeks after this transfer, he contracted Covid-19 and had to be hospitalized due
10 to heart failure and other medical complications. Id. at 14.

11 Based on the foregoing allegations, Plaintiff claims his rights under the Eighth
12 Amendment were violated based on the following: (1) exposure to hazardous conditions
13 based on overcrowding and unsanitary conditions, Dkt. No. 1 at 17-18; (2) deliberate
14 indifference to unreasonable risk of harm based on exposure to infectious and deadly
15 communicable disease – Covid-19, id. at 19-20; and (3) "cruel and unusual punishment –
16 deliberate indifference – Covid-19 exposure," id. at 21. Plaintiff seeks damages, including
17 punitive, and declaratory relief. Id. at 22. Liberally construed, Plaintiff states a cognizable
18 claim under the Eighth Amendment for deliberate indifference to inmate safety at SQSP
19 which resulted in harm. See Farmer v. Brennan, 511 U.S. 825, 832 (1994); DeShaney v.
20 Winnebago County Dep't of Social Servs., 489 U.S. 189, 199-200 (1989).

21 **C. Eleventh Amendment Immunity**

22 Plaintiff asserts that he is suing all the named Defendants "in their individual
23 capacity and Official capacity." Dkt. No. 1 at 16. The Eleventh Amendment to the U.S.
24 Constitution bars a person from suing a state in federal court without the state's consent.
25 See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-100 (1984). The U.S.
26 Supreme Court has held that state officials acting in their official capacities are not
27 "persons" under Section 1983 because "a suit against a state official in his or her official
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capacity is not a suit against the official but rather is a suit against the official's office." See Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989). Thus, such a suit is therefore no different from a suit against the state itself. Id. Accordingly, the Eleventh Amendment bars Plaintiff's claims for monetary relief to the extent that they are based on acts by Defendants in their official capacities. See id. Such claims for damages must be dismissed.

D. Defendant Newsom

The Court notes that the only factual allegation against Defendant Gavin Newsom is that he ignored Plaintiff's April 30, 2020 request for commutation. Dkt. No. 1 at 18. However, other than claiming that he sent the request to Defendant's Office, there is no allegation that Defendant Newsom was personally aware of Plaintiff's circumstances and yet failed to act to abate a known risk of serious harm by granting his release. Without such allegations, Plaintiff's claim against Defendant Newsom is conclusory. In the interest of justice, Plaintiff may file an amended complaint alleging sufficient facts to show that Defendant Newsom is individually liable for his injuries, if he can do so in good faith.

Liability may be imposed on an individual defendant under § 1983 only if Plaintiff can show that the defendant proximately caused the deprivation of a federally protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a constitutional right within the meaning of § 1983 if he does an affirmative act, participates in another's affirmative act or omits to perform an act which he is legally required to do, that causes the deprivation of which the plaintiff complains. See Leer, 844 F.2d at 633.

E. Defendant Tharratt

Defendant Dr. Steven Tharratt must be dismissed from this action. The Court takes judicial notice pursuant to Federal Rule of Evidence 201 of the filing in Case No. 3:20-cv-07845-CRB, Dkt. No. 37, 37-1, which attaches Dr. Tharratt's obituary published on the California Department of Corrections and Rehabilitation website on October 6, 2020,

announcing his passing on August 20, 2020, *available at* <https://www.cdcr.ca.gov/insidecdcr/2020/10/06/dr-robert-tharratt-longtime-cchcs-medical-director-passes-away/>. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (federal courts “may take judicial notice of court filings and other matters of public record”); *Bullock v. Johnson*, No. CV 15-2070 PA (AS), 2018 WL 5880736, at *13 n.19 (C.D. Cal. Aug. 10, 2018), report and recommendation adopted, No. CV 15-2070 PA (AS), 2018 WL 4791089 (C.D. Cal. Oct. 3, 2018) (taking judicial notice of CDCR obituary). Dr. Tharratt’s death therefore preceded the filing of this action on September 16, 2021. Dkt. No. 1. “[A] party cannot maintain a suit on behalf of, or against, or join, a dead person, or in any other way make a dead person (in that person’s own right, and not through a properly represented estate or successor) party to a federal lawsuit.” *LN Mgmt., LLC v. JP Moran Chase Bank, N.A.*, 957 F.3d 943, 955 (9th Cir. 2020). Dr. Tharratt is therefore not an appropriately named Defendant in this litigation. Any claim must be made against his estate in accordance with California Probate Code section 9350 et seq.

Defendant Tharratt is therefore **DISMISSED** from this action. If Plaintiff wishes to proceed with a claim against the Estate of Dr. Steven Tharratt, he must file a claim against the estate in accordance with the provisions of California Probate Code sections 9350-9354. If Plaintiff fulfills the requirements of the probate code, he may request to file an amended complaint adding the Estate of Dr. Steven Tharratt as a defendant in this case.

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Defendant Dr. Steven Tharratt is **DISMISSED** from this action. The Clerk shall terminate Defendant Tharratt from this action.
2. Plaintiff’s claim for damages based on Defendants’ actions in their official capacity is **DISMISSED** as barred by the Eleventh Amendment. *See supra* at 4-5. The

1 claim for damages against defendants in their individual capacity may proceed.

2 3. The claim against Defendant Gavin Newsom is DISMISSED with leave to
3 amend. Within twenty-eight (28) days from the date this order is filed, Plaintiff may file
4 an amendment to the complaint, alleging sufficient facts to state a cognizable Eighth
5 Amendment claim against Defendant Newsom.

6 **Failure to file an amendment in the time provided will result in the claim**
7 **against Defendant Newsom being dismissed from this action for failure to state a**
8 **claim for relief, and Defendant Newsom shall be terminated from his action.**

9 4. The following defendants at SQSP, CIM, and CDCR shall be served:

- 10 a. **Ron Broomfield, Acting Warden of SQSP**
- 11 b. **Kathleen Allison, Director of the CDCR**
- 12 c. **Ralph Diaz, Secretary of the CDCR**
- 13 d. **Ron Davis, Associate Director of Reception Centers for the CDCR**
- 14 e. **Dr. A. Pachynski, Chief Medical Officer at SQSP**
- 15 f. **Dr. L. Escobell, Chief Medical Officer at CIM**
- 16 g. **Clarence Cryer, Healthcare Chief Executive Director at SQSP**
- 17 h. **Dean Borders, Warden of CIM**
- 18 i. **Dr. Joseph Bick, Director of CCHCS for the CDCR**
- 19 j. **Dr. Shanon Garrigan, Chief Physician & Surgeon, SQSP**
- 20 k. **Nurse Podosky, Health Care Appeals at SQSP**

21 **Defendant Kelso** shall be separately served as directed under paragraph (5) below.

22 See infra at 4.

23 Service on the listed defendant(s) shall proceed under the California Department of
24 Corrections and Rehabilitation's (CDCR) e-service program for civil rights cases from
25 prisoners in CDCR custody. In accordance with the program, the clerk is directed to serve
26 on CDCR via email the following documents: the operative complaint and any attachments
27 thereto, Dkt. No. 1, this order of service, a CDCR Report of E-Service Waiver form and a
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1 summons. The clerk also shall serve a copy of this order on the plaintiff.

2 No later than 40 days after service of this order via email on CDCR, CDCR shall
3 provide the court a completed CDCR Report of E-Service Waiver advising the court which
4 defendant(s) listed in this order will be waiving service of process without the need for
5 service by the United States Marshal Service (USMS) and which defendant(s) decline to
6 waive service or could not be reached. CDCR also shall provide a copy of the CDCR
7 Report of E-Service Waiver to the California Attorney General's Office which, within 21
8 days, shall file with the court a waiver of service of process for the defendant(s) who are
9 waiving service.

10 Upon receipt of the CDCR Report of E-Service Waiver, the clerk shall prepare for
11 each defendant who has not waived service according to the CDCR Report of E-Service
12 Waiver a USM-205 Form. The clerk shall provide to the USMS the completed USM-205
13 forms and copies of this order, the summons and the operative complaint for service upon
14 each defendant who has not waived service. The clerk also shall provide to the USMS a
15 copy of the CDCR Report of E-Service Waiver.

16 5. **Defendant Clark Kelso, Federal Receiver** shall be served through the
17 Litigation Support Section of the California Correctional Health Care Services. The clerk
18 is directed to serve on Defendant Kelso **via email at HCLitigationSupport@cdcr.ca.gov**,
19 the following documents: the operative complaint and any attachments thereto, Dkt. No. 1,
20 a copy of this order of service, and a summons.

21 6. No later than **ninety-one (91) days** from the date this order is filed,
22 Defendants shall file a motion for summary judgment or other dispositive motion with
23 respect to the claims in the complaint found to be cognizable above.

24 a. Any motion for summary judgment shall be supported by adequate
25 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
26 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
27 qualified immunity found, if material facts are in dispute. If any Defendant is of the
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1 opinion that this case cannot be resolved by summary judgment, he shall so inform the
2 Court prior to the date the summary judgment motion is due.

3 b. **In the event Defendants file a motion for summary judgment, the**
4 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
5 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
6 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

7 7. Plaintiff's opposition to the dispositive motion shall be filed with the Court
8 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
9 motion is filed.

10 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
11 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment
12 must come forward with evidence showing triable issues of material fact on every essential
13 element of his claim). Plaintiff is cautioned that failure to file an opposition to
14 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
15 the granting of the motion, and granting of judgment against Plaintiff without a trial. See
16 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
17 F.3d 651, 653 (9th Cir. 1994).

18 8. Defendants shall file a reply brief no later than **fourteen (14) days** after
19 Plaintiff's opposition is filed.

20 9. The motion shall be deemed submitted as of the date the reply brief is due.
21 No hearing will be held on the motion unless the Court so orders at a later date.

22 10. All communications by the Plaintiff with the Court must be served on
23 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
24 copy of the document to Defendants or Defendants' counsel.

25 11. Discovery may be taken in accordance with the Federal Rules of Civil
26 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
27 Rule 16-1 is required before the parties may conduct discovery.

1 12. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
2 court informed of any change of address and must comply with the court's orders in a
3 timely fashion. Failure to do so may result in the dismissal of this action for failure to
4 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

5 13. Extensions of time must be filed no later than the deadline sought to be
6 extended and must be accompanied by a showing of good cause.

7 **IT IS SO ORDERED.**

8 **Dated:** February 9, 2022



EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

25 Order of Svc; of Dismissal with Leave to Amend
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